NO. 48751-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOHN LOTHAR BARAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00757-2

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

John Baran (hereafter 'Baran') was charged in Clark County Superior Court with two counts of Assault in the Third Degree against police officers Therman Bibens and Colton Price, as well as one count of Assault in the Fourth Degree against Thomas Peck, his roommate, and resisting arrest. CP 1-4. The evidence at trial showed that Baran and Mr. Peck shared a house in Vancouver Washington with their friend Conny Elliott. RP 32-33. During the evening of May 2, 2015, into the early morning hours of May 3, 2015, Baran argued with his roommates, the argument turning physical after some time. RP 34-44. Baran was intoxicated, but his roommates were able to get him into bed. RP 36. Mr. Elliott and Mr. Peck then watched TV in the living room, but the defendant soon started yelling and stomping down the hallway towards

them. RP 36-37. Baran argued with his roommates, especially Mr. Peck, and called Mr. Peck a "snitch" when Mr. Peck said he was going to call the police. RP 37-38. Mr. Peck then stepped outside to call the police and reported his roommate as drunk and abusive.

Mr. Peck then returned to the doorway of the apartment and informed Mr. Elliott and Baran that he had called police. Baran then charged towards the doorway and forcefully hit the door, causing the door to slam and hit Mr. Peck on the shoulder. RP 37-39. Mr. Peck then waited for police outside. RP 38-39.

Three police officers from Vancouver Police Department responded to the call. They observed the front door to Baran's residence partially open and could hear Baran yelling and Mr. Elliott trying to calm him down. RP 70. The officers entered and saw Mr. Elliott standing over the defendant who was seated on the couch. RP 70-71. The officers ordered Mr. Elliott away; Baran yelled obscenities at the officers and ordered them out of his house. RP 70. Officer Bibens told Baran to sit down and put his hand on Baran's shoulder. RP 72-74. Baran then grabbed Officer Bibens's arm and pulled him down onto himself. RP 72-74. Officer Bibens tried to do a "sleeper hold" on the defendant, putting his arm around his neck, but this maneuver was unsuccessful in part because

Baran is a large man and more agile than Officer Bibens anticipated. RP 72-77.

Officer Price attempted to assist Officer Bibens, but Baran kicked him in the groin causing significant paint. RP 121. The officers then struck Baran in the head with their elbows until Baran gave up his physical struggle. RP 78, 121-24. Baran eventually acquiesced to being handcuffed, but remained verbally abusive. RP 82, 125.

Baran testified that he is 30 years old, grew up in the foster care system in Portland, Oregon. RP 222-23. At the time of trial he was a student at Washington State University, and lived with Mr. Elliott and Mr. Peck. RP 223. Baran and Mr. Peck had some disagreements. RP 226. On the evening of May 2 into May 3, Baran went out with a friend from school. RP 227. He consumed alcohol that evening. RP 228. As Baran drove himself home, he felt the alcohol begin to affect him. RP 228-29. At home, Baran and Mr. Peck got into an argument over Baran driving while intoxicated, and Baran feeling like he needed to have his home be a place he could relax in. RP 230. Baran left his residence and went to a friend's house for a while. RP 230. He came back home, and Mr. Elliott tried to help Baran get into bed for the night. RP 231. From his room, Baran then heard yelling. RP 231. He went to Mr. Peck and challenged him to a fight. RP 231. Baran remembers there was a lot of "banter" back and forth

between himself and Mr. Peck, and then Mr. Peck was gone and Baran sat on the living room couch. RP 232. Mr. Peck had said he was calling the police. RP 232. Baran testified he had a "meltdown" because he is "scared of police." RP 232. Baran remembers police coming to his door and he yelled at them; he described himself as "verbally violent" towards the police officers. RP 234. Baran testified the police then came to him and started punching him in the face with their fists or elbows, and that he resisted them trying to put handcuffs on him. RP 234-35. Baran does not remember anything else about this incident until EMTs showed up. RP 236.

During his direct examination Baran stated the following about his character: "I'm not very assertive, I guess. And I'm very passive...." RP 225. Baran further told the jury he used to be a police cadet for the City of Portland. RP 228. Baran testified that he is "scared of police." RP 232.

During his cross-examination, Baran volunteered that he is "not an aggressor." RP 237. Baran further stated, "I don't go up to people and hurt people." RP 237. He later said, "I'm afraid of the cops. All the cops do is – all I've known from childhood, you know, they take me away from my parents. They've you know, they put me in a mental institution. They – you know, all I know police do is hurt me." RP 240.

During his cross-examination, the prosecutor asked the Court to remove the jury, and then argued that the substance of the defendant's testimony allowed the State to inquire into the facts of the defendant's prior conviction for assaulting a community corrections officer from a year prior to the incident. RP 241. The trial court granted the State's request and in so ruling stated the following:

> THE COURT: "Well, his testimony was also he's not an aggressor, yet he's pled guilty to an assault four against a law enforcement officer, a community corrections officer."

RP 245. The court ruled to admit the prior conviction. The court then turned to Baran, who had been argumentative throughout the trial, and said,

> THE COURT: So, Mr. Baran, if you want to contest that, here's the documents that show that happened. And if you argue about it in front of the jury, it's only going to get worse.
>
> BARAN: Yes, ma'am.
>
> THE COURT: So when Mr. Vaughn asks you, what are you going to say if you've been convicted of an assault in the fourth degree?
>
> BARAN: I have, ma'am.

RP 246. Baran did not seek to admit any further evidence regarding his prior conviction, and did not ask any questions on re-direct examination.

Prior to trial, the State moved to prohibit Baran from testifying about his mental health issues as he did not have an expert to discuss the issues nor was he pursuing a mental health-related defense. RP 11-13. The trial court granted the State's motion. RP 11-13.

The jury convicted Baran on all four counts. RP 300-04; CP 51-54. Baran received a standard range sentence and timely filed his appeal. CP 98-118.

ARGUMENT

I. The trial court properly admitted evidence of Baran's prior conviction.

Baran alleges the trial court denied him a fair trial when it allowed admission of evidence of his prior conviction for assault in the fourth degree against a community corrections officer. The trial court properly admitted this evidence. Baran's claim fails.

A trial court's decision to admit evidence is reviewed on appeal for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion if "its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn.App. 312, 319, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). A defendant may introduce evidence of his own good

character under ER 404(a)(1); the State is then entitled to rebut the same character evidence. ER 404(a)(1). Generally, ER 404(b) prohibits use of prior misconduct to prove a defendant's character, but it does not prohibit the use of such evidence to rebut a defendant's statements as to his own good character. *State v. Pogue*, 104 Wn.App. 981, 986, 17 P.3d 1272 (2001); *State v. McFadden*, 63 Wn.App. 441, 450, 820 P.2d 53 (1991). In fact, ERs 404(a) and 405 specifically provide for the admissibility of prior misconduct to rebut a defendant's admission of his own good character. If a criminal defendant places his character in issue by testifying as to his own past good behavior, then he may be cross-examined as to specific acts of misconduct unrelated to the charged crime. *State v. Brush*, 32 Wn.App. 445, 448, 648 P.2d 897 (1982), *rev. denied*, 98 Wn.2d 1017 (1983). When a witness 'opens the door,' the opposing party may introduce prior convictions to counter assertions of a law abiding past regardless of whether the conviction would have been admissible under ER 609. *See Brush,* 32 Wn.App. at 450.

When an accused offers evidence of his own character, the prosecution may be allowed to present evidence to rebut it. *State v. Avendano-Lopez,* 79 Wn.App. 706, 715, 904 P.2d 324 (1995); ER 404(a); ER 405(a). "The long-standing rule in this State is that a criminal defendant who places his character in issue by testifying as to his own past

good behavior, may be cross-examined as to specific acts of misconduct unrelated to the crime charged." *Brush*, 32 Wn.App. at 448. This rule gives the trial court discretion to admit evidence that may otherwise be inadmissible if the defendant "opens the door to the evidence." *State v. Warren*, 134 Wn.App. 44, 65, 138 P.3d 1081 (2006). The determination that the defendant has opened the door to such evidence is reviewed for an abuse of discretion. *Id.* (citing *State v. Bennett*, 42 Wn.App. 125, 127, 708 P.2d 1232 (1985)). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). Therefore, "[t]he trial court has considerable discretion in administering this open-door rule." *Ang v. Martin*, 118 Wn.App. 553, 562, 76 P.3d 787 (2003).

A party may "open the door" during the questioning of a witness to evidence that may otherwise be inadmissible. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). In *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), the Supreme Court explained:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might

> well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455. Under this doctrine, the trial court has the discretion to admit evidence that otherwise would have been inadmissible when a party raises a material issue and the evidence in question bears on that issue. *State v. Berg*, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). "[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict" the evidence regarding that issue. *Id.* at 939.

Further, the open door rule allows a party "to introduce evidence on the same issue to rebut any *false* impression" created by the other party. *U.S. v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) (emphasis original); *see also State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (stating "[w]here the defendant 'opened the door' to a particular subject, the State may pursue the subject to clarify a false impression.").

Baran offered evidence of his own good character at his trial. RP 237, 240. The admissibility of Baran's proffered evidence was not litigated pre-trial, nor was it litigated at the time of the admission. From a review of the evidence rules, the only permissible way Baran could admit

the evidence he did was pursuant to ER 404(a)(1). ER 404(a)(1) allows the defendant to offer evidence of a pertinent trait of his own character. *Id.* In an assault case, a defendant's character for peacefulness or nonviolence is pertinent and relevant. *See State v. Eakins*, 72 Wn.App. 271, 278, 869 P.2d 83 (1994) (holding that the defendant's reputation for being peaceful and law-abiding was relevant and admissible in his assault trial). Baran's character for peacefulness and nonviolence was therefore a "pertinent" trait that he could offer pursuant to ER 404(a)(1).[1] Once that occurred, both ER 404(a)(1) and ER 405(a) allowed the State to rebut that evidence with cross-examination on specific acts of conduct that tend to negate the evidence of defendant's good character. The trial court below properly allowed the State to inquire into Baran's prior assault conviction on cross-examination pursuant to ER 404(a)(1) and ER 405(a). The court did not admit this evidence pursuant to ER 404(b).

The admissibility of character evidence offered by a defendant as to his own character is governed by ER 404(a)(1). *See City of Kennewick v. Day,* 142 Wn.2d 1, 5, 11 P.3d 304 (2000). ER 404(a)(1) allows a defendant to offer evidence of a "pertinent" trait of character. "Pertinent"

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[1] ER 405 only allows evidence of a pertinent trait of character to be proved by reputation. Baran did not abide by this requirement in proving his character only by reputation. However, this issue is irrelevant, as once evidence of a pertinent trait of character is offered by the defendant, the State may offer evidence to rebut it under ER 404(a)(1) and ER 405(a).

as used here "is synonymous with 'relevant.'" *Id.* at 6. (quoting *State v. Eakins,* 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995)). Therefore "a pertinent character trait is one that tends to make the existence of any material fact more or less probable." *Eakins*, 127 Wn.2d at 495-96 (citing ER 401). In *Eakins*, at his trial for assault in the second degree, the defendant proffered numerous witnesses who would testify that he had a reputation in the community as a peaceful, law-abiding citizen. *Id.* at 494. The trial court denied the defendant's proffer, and excluded evidence of his character. *Id.* The Court of Appeals reversed the trial court's exclusion of the evidence, and the Supreme Court affirmed the court of Appeals. In so doing, the Supreme Court noted that the defendant's evidence of his peacefulness, "if believed by the jury, would make it less probable he would intentionally threaten another person with a deadly weapon if he were in full control of his faculties. Such evidence would be relevant to the element of intent...." *Id.* at 500. The Court found the defendant's character for peacefulness was a "pertinent" trait of character in his assault trial, and should have been admissible pursuant to ER 404(a)(1). *Id.*

Once a defendant places his character in issue, by offering evidence of a pertinent trait of his character for example, the defendant may be cross-examined as to specific acts unrelated to the crime charged. *State v. Hanson*, 46 Wn.App. 656, 661, 731 P.2d 1140 (1987); *State v.*

McFadden, 63 Wn.App. 441, 450, 820 P.2d 53 (1991) (finding that the State was entitled to introduce evidence of acts inconsistent with the defendant's portrayal of himself pursuant to ER 401(a)(1)). For example, in *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974), the defendant put her character in issue when she testified to her work and education experience, putting herself in a good light by discussing her participation in the Miss Yakima pageant, participation in the glee club, drill team, pep club, and science club. *Renneberg*, 83 Wn.2d at 736-38. There, the Court found the State was permitted to cross-examine the defendant on prior acts because this testimony painted a picture of someone unlikely to commit the crime. *Id.* at 738. In finding the State could cross-examine the defendant about prior, unrelated acts, the Court found, "[t]he state was entitled to complete the tapestry with [the defendant's] drug addiction." *Id.* Likewise in *Brush, supra*, the defendant testified to his educational, employment, and military history, and discussed his goal to become a teacher. *Brush*, 32 Wn.App. at 447-48. The defendant called himself a "people person" and said he received Christmas gifts from customers. *Id.* The implication from the defendant's testimony in *Brush, supra*, was that the defendant was not the sort of person who would commit rape, kidnapping, and assault. *Id.* This testimony opened the door, put his

character before the jury, and thus entitled the State to cross-examine the defendant about a prior conviction pursuant to ER 404(a)(1). *Id.*

Similarly, at the trial below, Baran testified that "I am not an aggressor. I don't go up to people and hurt people." RP 237. This evidence was volunteered, and was non-responsive to the prosecutor's original question of "[a]nd you told Mr. Peck you wanted to fight him?" RP 237. In response, Baran claimed that Mr. Peck had threatened to fight him and that he (Baran) is "not an aggressor." RP 237. Baran also testified, "[a]ll the cops do is – all I've known from childhood, you know, they take me away from my parents. They've – you know, they put me in a mental institution. They – you know, all I know police do is hurt me." RP 240. From this testimony it is clear the trial court properly allowed the State to cross-examine Baran on his prior conviction for assault. The State was entitled to cross-examine Baran on his prior act of assault when Baran introduced evidence that gave the jury the impression he was a peaceful person, and the police do bad things to him without cause.

Further, even if this Court finds that Baran did not offer evidence of his own good character pursuant to ER 404(a)(1), the 'open door' doctrine allows the State to offer evidence that is otherwise inadmissible to "explain, clarify, or contradict" the evidence Baran offered. *See Berg*, 147 Wn.App. at 939. In such situations, the evidence of the defendant's

character is not introduced to show that the defendant acted in conformity with his prior acts pursuant to ER 404(b). ER 404(b); *State v. Munguia*, 107 Wn.App. 328, 334, 26 P.3d 1017 (2001); *McFadden*, 63 Wn.App. at 450. The evidence is instead offered to respond to the defendant's assertions. This is precisely the situation that occurred in the case at bar; the trial court properly allowed the State to cross-examine Baran on this prior conviction after Baran opened the door by admitting evidence of his own good character.

Baran relies on *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001) in arguing that the trial court erred when it allowed the State to present evidence of his prior assault in the fourth degree conviction, and that this error was not harmless. In *Pogue*, Division I of this Court held that evidence that a defendant had prior experience with drugs and that he had possessed drugs in the past was not admissible to rebut an unwitting possession defense or to rebut his contention the police had planted the drugs. *Pogue*, 104 Wn.App. at 986-87. The Court of Appeals reversed the defendant's conviction, holding that the evidence had no relevance apart from showing the defendant's propensity to commit drug crimes. *Id.* However, the Court distinguished *Pogue* from other cases where a defendant makes sweeping assertions as to his good character. *Id.* at 985-86. The defendant had not made any statements implying he was not the

type of person to be involved in drugs, thus the defendant had not put his character into evidence and had not opened the door to propensity evidence. *Id.*

Unlike the defendant in *Pogue, supra,* Baran opened the door to evidence of his prior conviction by testifying that he was scared of the police and historically the police have only hurt him, thus implying he was not the kind of person to be the aggressor, and has only ever been the victim of police misconduct. Thus the State in Baran's case was entitled to rebut this evidence. Baran also cites to *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004) to support his argument the evidence of his prior conviction was particularly prejudicial. However, in *Acosta*, the evidence the court found overly prejudicial involved unproven acts, which had not resulted in convictions. *Acosta*, 123 Wn.App. at 434. There, the prior bad acts were unproven allegations that the court had no way of evaluating whether they had even occurred. *Id.*

Baran clearly opened the door to his character by testifying to his own good character and leaving the jury with an improper impression of his trait of peacefulness. The trial court properly allowed the State's inquiry into Baran's prior conviction during cross-examination. Baran's claim fails.

Even if the trial court erred in admitting this evidence, it was harmless error. An error in admitting evidence of this nature mandates reversal only if the error materially affected the outcome of the case within a reasonable probability. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). This type of error is harmless if it is of little significance in light of the evidence as a whole. *Id.* Though the State introduced evidence that Baran had previously been convicted of an assault, there is little probability this affected the jury's verdict. The State had three different victims who all testified to substantially similar versions of the events as they occurred; Baran, himself, admitted to being hostile and angry with police, and to resisting their efforts to subdue him. Even without evidence of Baran's prior conviction, any jury would still have returned guilty verdicts. Any error was harmless.

II. The trial court did not deny Baran his right to present a defense or to a fair trial.

Baran alleges the trial court dictated what he had to testify to in response to certain questions on cross-examination. This allegation is unfounded and Baran fails to show how the trial court's colloquy with him denied him the right to present his defense or the right to a fair trial. Baran's claim fails.

Specifically, Baran argues that he wanted to tell the jury about specifics of his prior conviction, but the court refused to allow him to testify to anything more than the fact of conviction. Br. of Appellant, p. 30. Baran further argues the trial court asking Baran how he would respond to the prosecutor's question on cross-examination of whether he had been previously convicted of an assault against a community corrections officer was tantamount to the court instructing Baran on what he could and could not say and giving legal advice, thus preventing Baran from actually testifying and presenting a defense of his choosing. This allegation is wholly unfounded and unsupported by the record.

Due Process requires the defendant be able to fairly defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 Led.2d 297 (1973). This includes a defendant's basic right to testify on his own behalf. *Id.* However, this right is not absolute. A defendant only has the right to present relevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). A defendant has no constitutional right to present irrelevant evidence. *Id.* A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *State v. Atsbeha,* 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

First, Baran's arguments have no factual merit. Baran's argument that the trial court told him what to say is not supported by the record. The

trial court specifically asked him, "[s]o when [the prosecutor] asks you, what are you going to say if you've been convicted of an assault in the fourth degree?" RP 245. This was not a leading question (a leading question is one which suggests the answer). The trial court effectively was holding an offer of proof to determine the proper scope of cross-examination on this issue. The court asked Baran what his response could be so that it could rule on the further issue of whether the State would be allowed to admit the judgment and sentence proving Baran's conviction, if he chose to deny its existence. The trial court's comment that it would get worse if he argued about the existence of his prior conviction was not legal advice, but rather was the trial court's admonition that the State would be allowed to delve further into this prior conviction dependent on his answer. The colloquy with the court does not show Baran's desire to testify further about the circumstances surrounding his prior conviction as Baran argues. Even if it did, this was cross-examination and the State had the right to ask only leading questions, and the court had the authority to direct the defendant to answer only the question asked. If Baran wanted to expound on that, he could have done so during re-direct examination. However, even re-direct examination would be subject to the rules of evidence, including relevance. A defendant's right to present a defense

and right to testify in his defense do not guarantee him the right to present irrelevant evidence. *Chambers, supra.*

Secondly, Baran's arguments have no legal support. Baran is essentially arguing that he was prevented from introducing relevant evidence at trial. However, the record shows Baran did not attempt to elicit such testimony during his direct examination, and did not ask any questions on re-direct examination, and Baran did not object or move to admit any further evidence on this subject. Failure to object or offer evidence precludes a defendant from arguing error from such failure on appeal. *See* RAP 2.5(a)(3). A defendant may not sit back and allow error to go forward at the trial court level and then use this error to obtain relief on appeal. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The party must give the trial court an opportunity to correct the error and avoid an appeal and subsequent new trial. *Id.* Baran centers his arguments on constitutional issues, such as his right to present a defense, right to counsel, and right to a fair trial, to overcome his failure to raise this issue at the trial court level. However, all issues of constitutional magnitude may not be raised for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A defendant may raise a manifest error affecting his constitutional rights for the first time on appeal. RAP 2.5(a)(3); *Walsh*, 143 Wn.2d at 7. To obtain review in such a circumstance, the defendant

must show the error is actually "manifest" and is truly of constitutional dimension. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). To have his issue reviewed for the first time on appeal, the defendant must show constitutional error that actually prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The first step is to determine whether this issue is truly of constitutional concern. Baran's argument is essentially one of evidentiary error shrouded in a constitutional claim. Baran alleges the trial court improperly restricted his ability to discuss the surrounding circumstances of his prior conviction. Baran did not offer any other evidence of his surrounding conviction, and did not object to what he characterizes as the trial court's exclusion of that evidence. This is clearly an issue of whether the trial court properly admitted or excluded evidence. Such issues are reviewed for an abuse of discretion, if they have been preserved for review. Evidentiary error generally cannot be raised for the first time on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986); ER 103(a)(1). Though many such evidentiary errors can be re-phrased in terms of constitutional issues, and potentially reviewed for the first time on appeal under the constitutional issue exception to the rule preventing

appellate review for unpreserved issues. *State v. Lynn*, 67 Wn.App. 339, 343, 835 P.2d 251 (1992). But this exception is "a narrow one, affording review only of 'certain constitutional questions.'" *Scott*, 110 Wn.2d at 687 (quoting Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). Baran has failed to present an issue that is truly of constitutional magnitude. But even if he did, he did not show that it was a manifest constitutional error.

The second step in this analysis is determining whether the alleged error was manifest. *Lynn,* 67 Wn.App. at 345. Essentially, the defendant must show that the error had "practical and identifiable consequences in the trial." *Id.* "Manifest" means "unmistakable, evident or indisputable." *Id.* (citing to *State v. Taylor*, 83 Wn.2d 594, 596, 52 P.2d 699 (1974)). Baran's claim of error is not of "manifest" error. The record shows the trail court's colloquy was simply to determine the extent of its need to rule on how the questions could be phrased by the State and whether it could go further in eliciting evidence of Baran's prior conviction, as that depended on whether Baran admitted the prior conviction or not. The trial court's questions were not leading; the trial court did not direct Baran that he had to answer "yes," it asked him how he would answer. Nothing in this colloquy was improper and Baran has failed to show the trial court prevented him from testifying. This is especially evident from Baran's failure to testify on redirect or in any other way attempt to elicit any other

evidence surrounding this issue. This shows that Baran did not intend or desire to elicit any further evidence on this issue.

Baran also would need to show this error affected his rights; he must show a likelihood of actual prejudice. *Lynn*, 67 Wn.App. at 346. Baran has not shown this. The record below is silent on what Baran would have said about this prior conviction. But if, as he suggests in his brief, he would have explained that it was not *his* community corrections officer that he assaulted, then he cannot show prejudice. The fact that it was a different community corrections officer than the one who handled his cases does not aid Baran in his defense that all police scare him and he is subject only to the bad things police have done to him. Had Baran explained it as such, the jury would only think he had an anger problem that he could not control with community corrections officers he only peripherally came into contact with, and not such an officer who monitored him and his cases, and who certainly had more opportunity to wrong him in the ways he claims police have wronged him. This additional information would have added nothing to Baran's case. Baran has not shown a likelihood of actual prejudice arising from the trial court's colloquy with him on the subject of his prior conviction.

Baran is unable to show manifest constitutional error from the trial court's colloquy on the subject of his prior conviction. The trial court did

not err, and even if it did, Baran cannot show how he was prejudiced thereby. His claim fails.

III. Baran received effective assistance of counsel.

Baran alleges his defense attorney was ineffective for failing to endorse a diminished capacity defense and for failing to seek a court appointed expert to support a diminished capacity defense. Baran's attorney's actions were appropriately strategic and reasonable and Baran cannot show he was prejudiced by these actions. Baran's claim fails.

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors

> were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Baran argues his counsel was ineffective for failing to pursue a diminished capacity defense. He argues that his attorney should have investigated a possible voluntary intoxication defense or diminished capacity defense based on his intoxication and/or his potential autism. There is nothing in the record to suggest that Baran's attorney was not aware of these possible defenses and declined to present them. It was reasonably tactical of Baran's attorney to pursue a defense of general denial as Baran vehemently denied assaulting anyone and claimed his actions were simply to protect himself and were resistive of advances on him, and that he did not make any assaultive contact. This defense is

inconsistent with the defenses of diminished capacity and voluntary intoxication, whereby the defendant agrees he committed the act in question, but was unable to form the intent necessary to sustain a conviction. These defenses require Baran admit to the crime; he elected to deny it. It is not ineffective assistance of counsel not to pursue incompatible defenses. *See, e.g., In re Pers. Restraint of Woods*, 154 Wn.2d 400, 421, 114 P.3d 607 (2005), *overruled in part on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). In *Woods*, the defendant claimed his attorneys were ineffective for failing to seek a diminished capacity defense. However, the Court on appeal noted that the defendant there adamantly denied his involvement in the crimes and thus a diminished capacity defense was entirely inconsistent with his stance that he was not even present when the crimes occurred. *Woods*, 154 Wn.2d at 421. The same is true for Baran's case. He was adamant that he did not assault anyone, that his only physical actions were to resist arrest, and that he never struck out at anyone. This is inconsistent with a potential defense wherein he would have had to admit he committed the actual act of assault, but failed to have the requisite mental state. As such it was not ineffective for his attorney to fail to endorse the defense of diminished capacity or voluntary intoxication.

Even if it was not reasonable for counsel to not pursue these defenses, Baran has not shown that this action prejudiced him. To prevail on his claim of ineffective assistance of counsel, Baran would have to show that but for his attorney's deficient performance, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. In *State v. Turner*, the Supreme Court rejected the defendant's argument that his attorney was ineffective for failing to pursue a diminished capacity defense because there was nothing in the record that any expert would have testified that the defendant lacked the ability to form the specific intent necessary to commit the crimes. *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Despite the director from the SW Washington chapter of the National Alliance on Mental Illness's letter about Baran's autism spectrum disorder, Asperger's, nothing in the record showed an expert would have testified that Baran lacked the ability to form the intent necessary to commit assault. The mere "[e]xistence of a mental disorder is not enough, standing alone, to raise an inference that diminished capacity exists, nor is conclusory testimony that the disorder caused a diminution of capacity." *State v. Gough*, 53 Wn.App. 619, 622, 768 P.2d 1028, *rev. denied*, 112 Wn.2d 1026 (1989). Without such a showing, Baran cannot show that any deficient performance on his attorney's part actually prejudiced him. Baran's claim of ineffective assistance of counsel fails.

IV. This Court should decline to deny the State's Potential future filing of a cost bill.

Baran argues under *State v. Sinclair*, 192 Wn.App. 280, 367 P.3d 612 (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn.App. 380, 386, 367 P.3d 612 (2016); *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative.

Baldwin, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra*, prematurely raises an issue that is not yet before the Court. Baran could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's

argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

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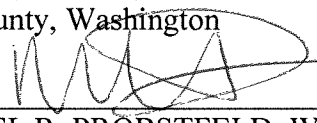
CONCLUSION

Baran has failed to show any error warranting reversal of his convictions. The trial court should be affirmed in all respects.

DATED this 25th day of October 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
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CLARK COUNTY PROSECUTOR

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